## APPENDIX A

[Filed July 17, 2001]

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Kenneth E. Curtis, Individually and d/b/a Privacy Protection Services, Appellant,

v.

The State of South Carolina, The South Carolina General Assembly, Charles Molony Condon, as Attorney General for the State of South Carolina, Robert M. Ariail as 13th Judicial Circuit Solicitor, The South Carolina Law Enforcement Division,
and John Mack Brown,
as Sheriff for Greenville County. Respondents.

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APPEAL FROM GREENVILLE COUNTY

THOMAS J. ERVIN, Special Circuit Court Judge

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Opinion No. 25319
Heard October 4, 2000 – Filed July 17, 2001

**AFFIRMED**

Robert C. Childs, III and Laura W. H. Teer, both of Mitchell, Bouton, Yokel & Childs, of Greenville, for appellant.

Attorney General Charles M. Condon, Senior

Assistant Attorney General Nathan Kaminski, Jr., and Assistant Attorney General Christie Newman Barrett, all of Columbia, for respondents.

**CHIEF JUSTICE TOAL:** Kenneth E. Curtis ("Curtis") appeals the trial court's denial of a temporary injunction concerning the enforcement of S.C. Code Ann. § 16-13-470 (Supp. 2000), which prohibits the selling of urine with the intent to defraud a drug screening test. We affirm.

## FACTS/PROCEDURAL HISTORY

In 1996, Curtis started an internet business known as Privacy Protection Services.[1] Through this business, Curtis sells his own urine, which is certified as drug and adulterant free, along with a "urine test substitution kit." Each urine test substitution kit comes with Curtis' urine, a pouch, a tube, and a chemical hand warmer device. Because proper temperature is critical for acceptance at any urine testing site, each kit comes with "chemically reactive supplemental heat sources" and a temperature monitoring system that insures proper acceptance temperature. Furthermore, the kit can be easily concealed on the body and can be used in a natural urinating position, which means it cannot be detected even if directly observed.[2] According to Privacy Protection Services' website: "Our complete urine test substitution kits allow

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[1] Privacy Protection Services can be found at www.privacypro.com.

[2] According to the website, each kit contains a small reservoir pouch (about the size of a pack of cigarettes) that has a small diameter tube that can be routed to the genital area. The tube has a flow/stop clip that makes dispensing easy and natural. The kit can be stored indefinitely or kept on hand in case of random testing. These complete kits provide everything needed for two urine testing procedures.

anyone, regardless of substance intake, to pass any urinalysis within minutes."[3]

Based on his website and his June 17, 1999, affidavit, Curtis maintains his primary objection to urine testing by employers is they do not merely test for drugs, they also test for pregnancy, diabetes, cigarette smoking, hypertension, and other diseases or genetic traits. He believes this type of testing by employers constitutes an infringement on the privacy rights of prospective employees and leads to access of private information.

On June 11, 1999, the Governor of South Carolina signed Senate Bill 277, which amended S.C. Code Ann. § 16-13-470 "to provide that selling urine with the intent to defraud a drug screening is a felony." Under section 16-13-470, the penalty for the first offense is a fine of not more than five thousand dollars and imprisonment of not more than three years, or both. The penalty for a second or subsequent offense is a fine of not more than ten thousand dollars or imprisonment of not more than five years, or both. S.C. Code Ann. § 16-13-470 (Supp. 2000). Pursuant to the statute, intent is presumed if a heating element or any other device used to thwart a drug-screening test accompanies the sale. *Id.*

On June 18, 1999, Curtis filed a Motion for an *Ex Parte* Temporary Restraining Order and a Motion for a Temporary Injunction. The trial judge granted the *Ex Parte* Temporary Restraining Order on June 18, 1999. On June 30, 1999, the trial court denied the Motion for a Temporary

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[3] In Curtis' Brief he maintains "he does not tout the product as a means to avoid detection of drug or alcohol abuse." However, the website describes how one can conceal the kit in any drug test. The website also includes a cartoon depicting a man urinating on a law enforcement officer. The cartoon is accompanied by the following quotation: "South Carolina law makers are pinching the weenie but can't stop the flow!"

Injunction and issued a formal Order. Curtis' Motion for Reconsideration was denied and this appeal followed.

On September 20, 2000, the Attorney General filed a Motion to Dismiss Appeal as Moot and a Motion to Supplement Record on Appeal with Memorandum in Support Thereof. On August 18,2000, the trial judge entered an order ruling on the merits of this case, holding section 16-13-470 constitutional and a legitimate exercise of the State's police powers. The Attorney General moves this Court to dismiss the appeal of the denial of a temporary injunction because the appeal is moot. According to the Attorney General's Motion, any order issued by this Court will be advisory and will have no practical effect on an existing controversy.

The following issues are before this Court on appeal:

I. Since the trial court has issued an order on the merits of this case, should this Court dismiss the appeal of the denial of a temporary injunction because the trial court's order renders the appeal moot?

II. Did the trial court err by holding Curtis is not entitled to a temporary injunction against the enforcement of section 16-13-470 when Curtis failed to establish that he will suffer irreparable harm or that he has no adequate remedy at law?

III. Did the trial court err in holding Curtis is not likely to succeed on the merits?

A. Does section 16-13-470 create an impermissible presumption of guilt?

B. Is section 16-13-470 vague, overly broad, and ambiguous?

C. What legitimate public purpose does section 16-13-470 protect?

D. Does section 16-13-470 infringe upon First Amendment rights?

E. Does section 16-13-470 violate equal protection?

F. Does section 16-13-470 constitute cruel and unusual punishment?

G. Does section 16-13-470 impermissibly interfere with interstate commerce?

H. Does section 16-13-470 abridge the right to privacy?

I. Does section 16-13-470 violate the Fourth Amendment?

IV. Did the trial court err in reaching the merits on a motion for
temporary relief?

## LAW/ANALYSIS

### I. Mootness

The Attorney General argues the appeal in this case is moot and any order issued by this Court will be advisory because the trial court has issued an order on the merits.[4]

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4 We granted the Attorney General's motion to supplement the Record on Appeal with the trial judge's order on the merits.

An appellate court will not pass on moot and academic questions or make an adjudication where there remains no actual controversy. *Jackson* v. *State*, .331 S.C. 486, 489 S.E.2d 915 (1997). Moot appeals differ from unripe appeals in that moot appeals result when intervening events render a case nonjusticiable. *See* Jean Hoefer Toal, Shahin Vafai & Robert A. Muckenfuss, *Appellate Practice in South Carolina* 122 (1999). "A case becomes moot when judgment, if rendered, will have no practical legal effect upon [the] existing controversy. This is true when some event occurs making it impossible for [the] reviewing Court to grant effectual relief." *Mathis* v. *South Carolina State Highway Dep't*, 260 S.C. 344, 346, 195 S.E.2d 713,715 (1973).

In the civil context, there are three general exceptions to the mootness doctrine. First, an appellate court can take jurisdiction, despite mootness, if the issue raised is capable of repetition but evading review. *See generally Byrd* v. *Irmo High Sch.*, 321 S.C. 426, 468 S.E.2d 861 (1996); *Citizen Awareness Regarding Educ.* v. *Calhoun County Publ'g, Inc.*, 406 S.E.2d 65 (W. Va. Ct. App. 1991) (holding an appellate court could consider newspaper's appeal from trial court's injunction compelling newspaper to publish political action advertisement even though case was moot because issue was capable of repetition yet evaded review). Second, an appellate court may decide questions of imperative and manifest urgency to establish a rule for future conduct in matters of important public interest. *See generally Berry* v. *Zahler*, 220 S.C. 86, 66 S.E.2d 459 (1951) (the court recognized that questions of public interest originally encompassed in an action should be decided for future guidance however abstract or moot they may have become in the immediate contest). Finally, if a decision by the trial court may affect future events, or have collateral consequences for the parties, an appeal from that decision is not moot, even though the appellate court cannot give effective relief in the present case. *See* 5 AM. JUR. 2D *Appellate Review* § 649 (1995).

An order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction is immediately appealable. S.C. Code Ann. § 14-3-330(4) (Supp. 2000); *Appeal of Paslay*, 230 S.C. 55, 94 S.E.2d 57 (1956) (appeal lay from the restraining order or temporary injunction). However, "[ t ]he rule that an appellate court limits its review to the issues necessary to a proper disposition of the appeal, and will not consider immaterial or moot questions, applies when reviewing decrees and orders relating to injunctions." 42 AM. JUR. 2D *Injunctions* § 335 (2000). Where only injunctive relief is sought and the need for that relief has ceased to be a justiciable issue, an appellate court should not review the merits, or consider the granting of a new trial after it has become impossible to have a new trial in the case. *See generally State ex rel. Matthews* v. *Eastin*, 297 P.2d 170 (Kan. 1956).

Texas courts have held an appeal of a temporary injunction is moot where a trial court renders final judgment while the appeal is pending. *See Lowe* v. *Farm Credit Bank of Texas*, 2 S.W.3d 293 (Tex. Ct. App. 1999); *Save Our Springs Alliance* v. *Austin Indep. Sch. Dist.*, 973 S.W.2d 378 (Tex. Ct. App. 1998) (trial court's final judgment rendered the appeal of the temporary injunction moot). According to Texas case law, dismissing an appeal from a temporary injunction after it has been rendered moot by final judgment is necessary to prevent premature review of the merits of the case. *Isuani* v. *Manske-Sheffield Radiology Group, P.A.*, 802 S.W.2d 235 (Tex. 1991).

The trial judge's June 30, 1999, Order renders this case nonjusticiable because any decision by this Court will not have a practical legal effect on the temporary injunction. The sole object of a temporary injunction is to preserve the subject of the controversy in its condition at the time of the order until opportunity is offered for full and deliberate trial investigation. *Epps* v. *Bryant*, 218 S.C. 359, 62 S.E.2d 832 (1950). Temporary injunctions are interlocutory, tentative, and impermanent and are superseded by the final judgment rendered on the merits. 42 AM. JUR. 2D *Injunctions* § 294 (2000). Thus, temporary injunctions "remain in force only

until, and expire upon, the entry of the final judgment and are not enforceable after the final judgment has been entered." *Id.*

Curtis has received a full investigation of his claim because the trial court has rendered a decision on the merits of this case. Therefore, the temporary injunction has expired and the issue is moot. However, we signed an Order taking the appeal on its merits from the Court of Appeals. We consolidated the merits appeal with the temporary injunction appeal. For the sake of judicial economy, we address the merits.

**II. Success on the Merits**

This Court has a limited scope of review in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid. *Davis* v. *County of Greenville,* 322 S.C. 73, 470 S.E.2d 94 (1996). "A possible constitutional construction must prevail over an unconstitutional interpretation." *Westvaco Corp.* v. *South Carolina Dep't of Revenue,* 321 S.C. 59, 467 S.E.2d 739 (1995). Further, a legislative act will not be declared unconstitutional unless its repugnance to the Constitution is clear and beyond a reasonable doubt. *Id.* Because Curtis does not establish an infringement of a constitutional right, the trial court was correct in holding he is not likely to succeed on the merits of the following constitutional challenges.

**A. Impermissible Presumption of Guilt**

Curtis argues section 16-13-470 unconstitutionally shifts the burden of proof on the issue of criminal intent to the defendant. We agree. Specifically, section 16-13-470 states, "[i]ntent is presumed if a heating element or any

other device used to thwart a drug-screening test accompanies the sale, giving,
distribution, or marketing of urine or if instructions which provide a method for thwarting a drug-screening test accompany the sale, giving, distribution, or marketing of urine."

Section 16-13-470 unconstitutionally shifts the burden of proof to the criminal defendant because it states that "intent is presumed" when certain conditions are met. This language violates the United States Supreme Court's holding in *Sandstrom* v. *Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) because it acts as a conclusive presumption. In *Sandstrom*, the United States Supreme Court held the defendant's due process rights were violated by a jury instruction on the issue of intent where the trial judge instructed, "the law presumes that a person intends the ordinary consequences of his voluntary acts." According to the Supreme Court, the jury in *Sandstrom* may have interpreted the trial judge's instruction as a burden shifting presumption or a conclusive presumption. This jury instruction violates the Fifth and Fourteenth Amendment's due process requirement that the State prove every element of a crime beyond a reasonable doubt. In finding such a presumptive instruction unconstitutional, the Supreme Court found where intent is an element of the crime charged, it follows that the trial court may not withdraw or prejudge the issue by instructing the jury the law raises a presumption of intent from an act. *Sandstrom, supra.* This invades the fact finding responsibility of the jury.

A statute may be constitutional and valid in part and unconstitutional and invalid in part. *Thayer* v. *South Carolina Tax Comm'n*, 307 S.C. 6, 413 S.E.2d 810 (1992). We find the unconstitutional intent language is severable from the remainder of section 16-13-470. The test for severability is whether the constitutional portion of the statute remains complete in itself, wholly independent of that which is rejected, and is of such a character that it may fairly be presumed the legislature would have passed it independent

of that which conflicts with the constitution. *Joytime Distribs. & Amusement Co.* v. *State*, 338 S.C. 634, 648-649, 528 S.E.2d 647, 654 (1999) (citations omitted). "When the residue of an Act, sans that portion found to be unconstitutional, is capable of being executed in accordance with the Legislative intent, independent of the rejected portion, the Act as a whole should not be stricken as being in violation of a Constitutional Provision." *Id.* (quoting *Dean* v. *Timmerman*, 234 S.C. 35, 43, 106 S.E.2d 665, 669 (1959)).

We find the unconstitutional intent language is severable from the remainder of section 16-13-470. The remainder *of* the statute outlines the different unlawful ways a person can attempt to defraud a drug and alcohol screening test, using general language to describe intent. The remainder of the statute is complete without the intent presumption language because it allows the jury to infer intent from the circumstantial evidence presented at trial. We presume the legislature would have passed section 16-13-470 regardless of whether the presumption language was included. We, therefore, sever the unconstitutional presumption language from the rest of the statute.

**B. Unconstitutionally Vague and Overbroad**

Curtis aruges section 16-13-470 is unconstitutionally vague and overbroad. We disagree.

"The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication." *City of Beaufort v. Baker*, 315 S.C. 146, 152, 432 S.E.2d 470, 472 (1993). The constitutional standard for vagueness is the practical criterion of fair notice to those to whom the law applies. *Huber* v. *South Carolina State Bd. of Physical Therapy Exam'rs*, 316 S.C. 24, 446 S.E.2d 433 (1994). A law is unconstitutionally vague if it forbids or requires the doing of an act in terms so vague that a person of common intelligence must necessarily guess as to its meaning and differ as to its application. *Toussaint v. State Bd. of Med.*

*Exam'rs,* 303 S.C. 316, 400 S.E.2d 488 (1991). One to whose conduct the law clearly applies does not have standing to challenge it for vagueness. *Id.*

Although some of the terms in section 16-13-470 are undefined, the intent of the statute is clear on its face. The statute makes it unlawful to "sell, give away, distribute, or market urine. ..with the intent to defraud a drug or alcohol screening test." A person of ordinary intelligence seeking to obey the law will know, and is sufficiently warned of, the conduct the statute makes criminal. Curtis argues that section 16-13-470 is unconstitutionally vague because terms such as "foil," "spike," "defraud," "bodily fluids," and "adulterate" are not defined. However, all of these terms have common, ordinary meanings sufficient to proscribe conduct, and do not need to be specifically defined. *See State v. Hamilton,* 276 S.C. 173, 276 S.E.2d 784 (1981) (the fact that "force or coercion" was undefined by the statute did not render the statute vague or ambiguous because the words are of common, ordinary meaning and are sufficiently specific to proscribe the conduct). Further, all the Constitution requires is that the language convey sufficiently definite warnings as to the proscribed conduct when measured by common understanding and practices. *See State* v. *Solomon,* 245 S.C. 550, 141 S.E.2d 818 (1965).

**C. Legitimate Public Purpose**

Curtis argues section 16-13-470 serves no legitimate public purpose. He argues there is no legitimate public purpose in helping "private industry do urine testing that doesn't even reflect accurately on their consumption of substances and which has no relation to impairment of safety." Curtis also argues the Attorney General fails to submit affidavits demonstrating how section 16-13-470 will serve to lessen drug use in the workplace or in any way promote the safety, health, or welfare of the citizens of South Carolina. We disagree.

As noted in the trial court's Order, the United States Supreme Court has held drug testing of employees through urinalysis is lawful and constitutional. *See Skinner* v. *Railway Labor Executives' Ass'n*, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989) (testing railway employees for drugs and alcohol after a serious accident was constitutional). The General Assembly has passed several statutes that permit random drug testing to further the public policy of a drug-free work environment. *See* S.C. Code Ann. § 38-73-500 (Supp. 2000) (provides a workers' compensation credit for random drug testing to provide incentive for employers to prevent drug use and work-related accidents); S.C. Code Ann. § 41-1-15 (Supp. 2000) (authorizing an establishment of drug prevention program in the workplace which includes a substance abuse testing program).

A statute making it unlawful to defraud a drug test furthers the public purpose of ensuring a drug-free workplace. Section 16-13-470 is a legitimate exercise of the State's police powers in regulating public safety and welfare. Furthermore, the public purpose of creating safety in the workplace outweighs any legitimate interest, if any, of Curtis in doing business.

**D. First Amendment Rights**

Curtis argues section 16-13-470 violates his right to free speech because it directly prohibits the expression of ideas relative to urine testing. We disagree.

Along with his urine, Curtis provides literature with instructions on how to defeat a drug test and literature regarding his political beliefs on drug testing. Section 16-13-470 does not prohibit Curtis from dispensing literature regarding his political beliefs on urine testing. Furthermore, we sever the provision from section 16-13-470 which states that intent will be presumed if "instructions which provide a method for thwarting a drug-screening test" accompanies the sale of his urine. We find the remaining statute does not infringe on Curtis' right to free speech.

**E. Equal Protection**

Curtis argues section 16-13-470 violates the Equal Protection Clause because it differentiates urine sales from the sale of herbal supplements and other products sold to mask drugs in one's urine.[5] We disagree.

The Equal Protection Clause provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. A classification does not violate the Equal Protection Clause if: (1) the classification bears a reasonable relation to the legislative purpose sought to be effected; (2) the members of the class are treated alike under similar circumstances and conditions; and (3) the classification rests on some reasonable basis. *Whaley v. Dorchester County Zoning Bd. of Appeals,* 337 S.C. 568, 524 S.E.2d 404 (1999). The determination of whether a classification is reasonable is initially one for the legislative body and will be sustained if it is not plainly arbitrary and there is a reasonable hypothesis to support it. *Id.* "The fact that the classification may result in some inequity does not render it unconstitutional." *Id.* (citing *Davis v. County of Greenville,* 313 S.C. 459, 465, 443 S.E.2d 383, 386 (1994)).

This case does not involve a suspect classification or a fundamental right, so the question under equal protection analysis is whether the legislation is rationally related to a legitimate state purpose. *Casbah, Inc.,* v. *Thone,* 651 F .2d 551 (8th Cir. 1981) (citing *Massachusetts Ed. of Ret.* v. *Murgia,* 427 U.S.. 307, 96 S. Ct. 2562, 49 L. Ed. 2d 520 (1976)). We find the classification of an individual who sells urine or an adulterant to defeat a drug test is rationally related to the legitimate state purpose of promoting a safe work environment. First, the classification is reasonably related to the legislative purpose of insuring the safety of the

[5] For example, Curtis argues the sale of water is not prohibited even thought it is the primary adulterant used to defeat urine tests.

workplace through the protection of drug testing programs. Second, all people who constitute the class are treated similarly. The classification rests on a reasonable basis and includes any person who sells a product intended to adulterate urine or other bodily fluid sample for the purposes of defrauding a drug or alcohol screening test. S.C. Code Ann. § 16-13-470(A)(5). Curtis' equal protection claims fails because all individuals who engage in conduct prohibited by section 16-3-470 are treated alike, regardless of whether they adulterate urine samples with herbal supplements or chemicals.

**F. Cruel and Unusual Punishment**

Curtis argues the sentence proscribed by section 16-13-470 constitutes cruel and unusual punishment in violation of the Eighth Amendment because the sentence is grossly disproportionate to the severity of the crime. We disagree.

The Eighth Amendment only prohibits sentences which are grossly out of proportion to the severity of the crime. *Yeargin* v. *South Carolina Dep't of Highways & Pub. Transp.*, 313 S.C. 387, 438 S.E.2d 234 (1993) (citations omitted). Pursuant to section 16-13-470, the punishment for a first offense misdemeanor conviction is a fine not more than five thousand dollars or imprisonment of not more than three years, or both. A second, or subsequent, conviction is a felony punishable by a fine not more than ten thousand dollars or imprisonment not more than three years, or both. This punishment is not inhumane or disproportionate to the severity of the crime. The trial court has discretion as to the amount of the fine or length of imprisonment. Moreover, section 16-13-470 does not preclude the sentencing authority from considering mitigating and aggravating circumstances in fashioning an appropriate sentence.

**G. Interstate Commerce**

Curtis argues section 16-13-470 prohibits the flow of interstate goods and impermissibly burdens interstate commerce. We disagree.

First, this case does not involve the commerce clause, it involves the legislature's exercise of its police powers to prohibit commerce that is intended to defraud South Carolina employers and create an unsafe work environment. Furthermore, section 16-13-470 does not unduly burden interstate commerce because it does not ban the sale of urine and other bodily fluids. It simply makes it unlawful for someone to sell, give away, distribute, or market urine with the *intent* to use the urine to defraud a drug or alcohol screening test.

**H. Right to Privacy**

Curtis argues he has a constitutional right to sell his urine. He also argues that South Carolina has placed itself in the unlawful position of monitoring urine testing. We disagree.

First, section 16-13-470 does not involve an act of surveillance by the State, it involves the commercialization of urine to defraud drug tests. Second, Curtis does not have standing to assert section 16-13-470 unconstitutionally invades the privacy rights of those who are subject to urine testing. *See Stone* v. *Salley*, 244 S.C. 531, 537, 137 S.E.2d 788, 790 (1964) *overruled on other grounds by R.L. Jordan Co.* v. *Boardman Petroleum, Inc.*, 338 S.C. 475, 527 S.E.2d 763 (2000) (holding a plaintiff "cannot obtain a decision as to the invalidity of [an] Act on the ground that it impairs the rights of others."). Finally, the statute does not prohibit Curtis from doing what he wants with his urine. He could even sell his urine for other purposes as long as he does not intend to defraud a drug or alcohol screening test.

**III. Fourth Amendment**

Curtis argues section 16-13-470 violates the Fourth Amendment. We disagree. In essence, Curtis attempts to assert the Fourth Amendment rights of his customers against drug testing in the workplace. First, Curtis does not have standing to assert the constitutional rights of his customers. *See Stone, supra.* Second, section 16-13-470 does not mandate drug testing, it simply makes it a crime to sell urine or other adulterants with the intent to defraud a drug test.

**IV. The Merits**

Curtis argues the trial court erred in reaching the merits on his Motion for Temporary Relief. We disagree.

In determining whether a temporary injunction should issue, the trial judge should not consider the merits of the case, except as they may enable the trial court to determine whether a prima facie showing has been made. *Transcon. Gas Pipe Line Corp.* v. *Porter,* 252 S.C. 478, 167 S.E.2d 313 (1969). When a prima facie showing has been made entitling the plaintiff to injunctive relief, a temporary injunction will be granted without regard to the ultimate termination of the case on the merits. *Id.* However, when a plaintiffs' prima facie case depends on an allegation that a statute in unconstitutional, the trial judge must consider the matter in determining the reasonable necessity for a temporary injunction. *Hutchison v. York County,* 86 S.C. 396, 68 S.E. 577 (1910). In order to reverse the refusal of a temporary injunction in such a case, this Court must review the constitutional question. *Id.*

A trial court may consider a case's merit to the extent necessary to determine whether a temporary injunction should issue. *Roberts v. Union County Bd. of Sch. Trs.,* 284 S.C. 299, 326 S.E.2d 163 (Ct. App. 1985). The trial court in this case found Curtis was not likely to succeed on the merits

because he had not established a valid infringement upon a fundamental constitutional right. Although the trial judge ruled on the merits of Curtis' constitutional arguments, it was necessary to determine the likelihood of success on the merits. Furthermore, according to *Hutchison, supra,* it was proper for the trial judge to consider the merits because Curtis' prima facie case depended on an allegation that section 16-13-470 was unconstitutional.

## CONCLUSION

We sever the unconstitutional presumption language from section 16-13-470, affirm the trial court's order upholding the constitutionality of the remainder of section 16-13-470, and find section 16-13-470 is a valid exercise of the State's police powers.

MOORE, WALLER, BURNETT, JJ., concur. PLEICONES, J., concurring in result only.

**APPENDIX B**

THE STATE OF SOUTH CAROLINA
In The Supreme Court

Kenneth E. Curtis,
Individually and d/b/a
Privacy Protection Services, Appellant,

v.

The State of South Carolina,
The South Carolina General
Assembly, Charles Molony Condon,
as Attorney General for the
State of South Carolina, Respondents.

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APPEAL FROM GREENVILLE COUNTY

JUDGE ALISON R. LEE, Circuit Court Judge

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Memorandum Opinion No. 2001-MO-060
Submitted September 27, 2001 – Filed October 12, 2001

**AFFIRM AS MODIFIED**

Robert C. Childs, III, and Laura W. H. Teer, both of Mitchell, Bouton, Yokel & Childs, of Greenville, for appellant.

Attorney General Charles M. Condon, Senior Assistant Attorney General Nathan Kaminski, Jr., and Assistant

Attorney General Christie Newman Barrett, all of Columbia, for respondents.

**CHIEF JUSTICE TOAL**: Kenneth Curtis, d/b/a Privacy Protection Services ("Appellant") appeals the trial court's ruling upholding the constitutionality of S.C. Code Ann. § 16-13-470 (Supp. 2000).

## FACTUAL/PROCEDURAL BACKGROUND

On June 18, 1999, Appellant filed a Motion for an Ex Parte Temporary Restraining Order and a Motion for a Temporary Injunction seeking to enjoin the enforcement of S.C. Code Ann. § 16-13-470 ("Act"), which makes selling urine with the intent to defraud a drug screening test a felony. After a hearing, Judge Ervin, Circuit Court Judge, issued an Order on June 30, 1999, denying the Appellant's Motion for a temporary injunction. Appellant appealed Judge Ervin's Order, and that appeal was heard by this Court on October 4, 2000. This Court issued an opinion on July 17, 2001, affirming Judge Ervin's Order and finding section 16-13-470 constitutional after severing the "presumption" language from the remainder of the statute. *Curtis v. State*, 345 S.C. 557, 549 S.E.2d 591 (2001).

While the appeal before this Court was pending, Judge Henry Floyd conducted a hearing and ordered the proceedings below bifurcated with regard to the damages and constitutional issues. On May 2, 2000, Judge Alison Lee heard the merits of the case and ruled the statute was constitutional. Appellant now appeals Judge Lee's Order, and the issues before this Court are:

I. Did the trial court err in finding Appellant openly promoted his product for "cheating" employer mandated drug test and that Appellant was engaged in the business to assist individuals in defrauding employers?

II. Did the trial court err in finding the Act does not infringe upon a protected property right of the Appellant?

III. Does the Act create an impermissible presumption of guilt?

IV. Did the trial court err in finding the Act serves a legitimate public purpose?

V. Did the trial court err in failing to find the Act is vague, overly broad, and ambiguous?

VI. Did the trial court err in holding the Act does not violate Equal Protection?

VII. Did the trial court err in finding the Act does not infringe on Appellant's First Amendment Rights?

VIII. Did the trial court err in finding the Act did not constitute Cruel and Unusual Punishment in violation of the Eighth Amendment?

IX. Did the trial court err in finding the Act does not impermissibly interfere with interstate commerce?

X. Did the trial court err in finding the Act does not interfere with Appellant's Right to Privacy?

XI. Did the trial court err in finding the Act does not violate the Fourth Amendment?

**LAW/ANALYSIS**

Appellant argues the trial court erred in finding that Appellant openly promoted his product for "cheating" employer mandated drug tests and that Appellant was

engaged in the business of assisting individuals in defrauding employers. We disagree.

Judge Lee's ruling was on the constitutionality of the Act. This is a case brought by the Appellant against the state to enjoin the enforcement of the Act. This was not a criminal prosecution of Appellant. Judge Lee was not to determine whether Appellant would be guilty of violating the Act. Any observations Judge Lee made in her Order with respect to Appellant's intent when selling his urine were not part of her ruling on constitutionality. Therefore, they in no way affected her ruling on the Act's constitutionality.

Furthermore, Judge Lee's "fact" finding was supported by the record. In the "Factual Background" section of her August 9, 2000, Order, Judge Lee held: "Based upon the Internet site documents and news articles presented by the State, Curtis openly promotes the use of his products for the purpose of 'cheating' on employer mandated drug tests."

In an action at law, tried without a jury, a trial court's factual findings will not be disturbed on appeal unless there is no evidence in the record to reasonably support the trial judge's findings. *Crary v. Djebelli*, 329 S.C. 385, 496 S.E.2d 21 (1998); *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). In the instant case, Judge Lee relied upon the Appellant's own website, and newspaper articles contained on Appellant's website when making her determination that Appellant promoted his products for the purpose of "cheating" on employer mandated drug tests. For example, the homepage of Appellant's website advertises "Complete urine test substitution kits allow anyone, regardless of substance intake, to pass any urinalysis within minutes." One of the newspaper articles on Appellant's site states, "Taking a drug test? Wanna cheat? One Greenville-based company helps people do just that." Kerry Eleveld, *Making Money on the Cheat; GSA Company Helps Employees Elude Drug Tests*, GSA Business, October 7, 1998. Therefore,

there is ample evidence in the record to support Judge Lee's finding.

Because Judge Lee's "fact finding" did not affect her ruling on the constitutionality of the Act and was supported by evidence in the record, we find no error.

**II. Property Right**

Appellant argues the trial court erred by failing to find that the Act infringes on a protected property right. We disagree.

In support of his argument that the right to pursue an occupation is a legitimate entitlement within the protective purview of the Due Process Clause, Appellant quotes *Truax v. Raich,* 36 S.Ct. 7, 239 U.S. 33, 60 L.Ed. 131 (1915). In *Truax,* the United States Supreme Court held, "It requires no argument to show that the right to work for a living *in the common occupations of the community* is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." *Id.* at 10, 239 U.S. at 41 (emphasis added). However, Appellant is not engaged in a "common occupation of the community."[1]

South Carolina does recognize the right to pursue "lawful" occupations. *See Frost v. Berkeley Phosphate Co.,* 42 S.C. 402, 20 S.E. 280 (1894). However, there is no state case law which grants an individual the right to engage in an unlawful occupation. In this case, the state legislature, as it

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[1] The only other part of Appellant's one page brief argument on this issue is an attempt to distinguish a case, *Andrus v. Allard,* 100 S. Ct. 318, 444 U.S. 51, 61 L. Ed. 2d 210 (1979) which Appellant claims Judge Lee relied on in determining that the Act did not violate any property right. Confusingly, the trial court's order does not cite this case in any manner. Furthermore, Appellant attempts to use
Andrus to help his case by quoting a portion of the opinion which addresses *standing,* not the due process clause.

is entitled, reasonably and rationally determined that an occupation, involving the selling of urine to defraud drug tests or robbing banks, is unlawful.

Therefore, we find Appellant does not have a valid property right. Therefore, Judge Lee's order is affirmed on this issue.

### III. Presumption of Guilt

Appellant argues the Act creates an impermissible presumption of guilt. For the reasons set forth in *Curtis* v. *State,* we sever the offending language from the rest of the Act.

### IV. Remaining Issues

The remaining issues are affirmed pursuant to Rule 220, SCACR, and the following authority: *Curtis v. State,* 345 S.C. 557, 549 S.E.2d 591 (2001).

### CONCLUSION

For the aforementioned reasons, the trial court's Order is **AFFIRMED** as modified.
**MOORE, WALLER, BURNETT and PLEICONES, JJ., concur**

**APPENDIX C**

THE SOUTH CAROLINA SUPREME COURT

Daniel E. Shearhouse
Clerk of Court
P.O. Box 11330
Columbia, South Carolina 29211

August 10, 2001

Robert C. Childs, III, Esquire Laura W.H. Teer, Esquire
Mitchell, Bouton, Yokel & Childs
POBox 10285, F .S.
Greenville, SC 29603

Re: Curtis, Kenneth E. v. State of SC, et al

Dear Counsel:

The Court has refused your Petition for Rehearing in the above case in the following

Order:

"Petition for Rehearing is denied.

s/ Jean H. Toal C.J.

s/ James E. Moore J.

s/ John H. Waller, Jr. J.

s/ E.C. Burnett, III J.

s/ Costa M. Pleicones J.

August 10, 2001."

The remittitur in this matter is today being forwarded to the Clerk of Court for Greenville County.

Very truly yours,

CLERK

DE S/dj p
cc: Assistant Attorney General Christie Newman Barrett

## APPENDIX D

THE SOUTH CAROLINA SUPREME COURT

Daniel E. Shearhouse
Clerk of Court
P.O.Box 11330
Columbia, South Carolina

August 10, 2001

REMITTITUR

The Honorable Paul B. Wickensimer 305 E. North Street, Rm. 224 Greenville, SC 29601-2120

Re: Curtis, Kenneth E. v. State of SC, et al
99-CP -23- 2463

Dear Mr. Wickensimer:

The above referenced matter is hereby remitted to the trial court. A copy of the judgment of this Court is attached.

Very truly yours,

CLERK

Enclosure

cc: Robert C. Childs, III, Esquire
Laura W.H. Teer, Esquire
Assistant Attorney General Christie Newman Barrett

## APPENDIX E

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Alison Renee Lee, Circuit Court Judge

---

Case No. 99-CP-23-2463

---

Kenneth E. Curtis, Individually and d/b/a Privacy Protection Services, Appellant,

v.

The State of South Carolina, The South Carolina General Assembly Ex rel, Charles Molony Condon, as Attorney General for the State of South Carolina, Respondent.

---

PETITION FOR REHEARING AND
MEMORANDUM IN SUPPORT THEREOF

---

Robert C. Childs, III, #1218
Laura W. H. Teer, #16698
Beth M. Harbin, # 68249
MITCHELL, BOUTON, YOKEL&CHILDS
Attorneys for Appellant
Post Office Box 10285, F.S.
Greenville, S.C. 29603
(864) 232-9330

Pursuant to Rule 221 SCARC, the Respondent respectfully requests that this Court rehear the issues of whether S.C. Code Ann. § 16-13-470 is unconstitutionally vague and overbroad, whether it serves a legitimate public purpose, and whether it violates the Equal Protection Clause. The Petitioner believes that this court may have overlooked and failed to consider the following:

1. That this Court may have overlooked that the Act, as written, is unconstitutionally vague and overbroad and is almost impossible to comply with. The Act fails to define what it means by defrauding a drug or alcohol test.

The test for determining whether the statute is unconstitutionally vague was set forth in State v. Albert, 257 S.C. 131, 184 S.E.2d 605 (1971). "The concept of vagueness or indefiniteness rests on the constitutional principle that procedural due process requires fair notice and proper standards for adjudication. The primary issues involved are whether the provisions of a penal statute are sufficiently definite to give a reasonable notice of the prohibited conduct to those who wish to avoid its penalties and to apprise judge and jury of standards for the determination of guilt. If the statute is so obscure that men of common intelligence must necessarily guess at its meaning and differ as to its applicability, it is unconstitutional." The subject Act is not sufficiently definite to give reasonable notice of the prohibited conduct because it is so broad in its scope. Under the Act, as written, even consuming water before a drug screening test could be a violation.

The Act does not define whether it is applicable to screening only for illegal drugs and alcohol, substance abuse, or whether it applies to non-impairing prescription medications as well. Applied broadly, if one attempted to conceal their partaking of hypertensive drugs, one would be guilty of this offense. Of course, this statute is not limited to its application of drugs that impair. It apparently applies to tests for any type of drugs whether legal or not, subject to abuse or not. A person who sells, distributes, uses, or gives away any substance may be in violation of the Act, as any substance may "adulterate" urine or other bodily fluids. It is

certainly overbroad for this statute to apply to "a drug screening" of any type.

2. That this Court may have failed to consider in its public policy argument that while S.C. Code Ann. § 41-1-15 allows an employer to establish a drug prevention program which includes substance abuse testing, these test results shall not be released for or used or admissible in any criminal proceeding against the employee. S.C. Code Ann. § 41-1-15(D). In the present case, the statute is addressed solely at applying a criminal penalty to the arena of drug testing by private employers. Rather than making the information private or linking it to a drug prevention program, the Act is strictly penal in nature.

This statute does not address workplace safety, rather it is aimed only at halting the Appellant's business. There are no public consequences to testing positive to a drug test administered on the job. In fact, employers may only release information of a positive result to certain enumerated people. The Legislature has imposed a public consequence, however, for "defrauding a drug or alcohol screening test." This public consequence also extends to anyone using or selling any substance which may alter the results of a drug or alcohol screening test. If the Legislature truly had an interest in preventing drug use in the workplace, it would impose a criminal penalty for testing positive on a drug test administered by an employer.

3. That this Court may have overlooked the fact that although drug testing of employees through urinalysis was upheld by the United States Supreme Court in Skinner v. Railway Labor Executives' Association, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989), that case involved safety sensitive jobs and testing was performed only on reasonable suspicion or following an accident. The current case involves even random, suspicionless urinalysis of employees in jobs that aren't safety sensitive. The State is now intervening between private businesses and employees. This Act represents a dangerous expansion of the intrusions which have previously been allowed.

Previous statutes have addressed urinalysis first for employees in safety sensitive jobs and following an accident and eventually for all employees on a random basis. These

laws gave the employer the right to implement urinalysis procedures to monitor his own employees. No statute has gone so far as to say that private employers must test all employees to ensure workplace safety. Even if random urinalysis is rationally related to workplace safety, the subject Act is one step removed from this rational relationship. The State is now imposing a criminal penalty for the sale of urine or the sale or use of any other substance that could alter a drug or alcohol screening test. The Act imposes this criminal penalty even though there is no evidence that the sale or use of these substances actually defrauds drug screening tests or that prohibiting such activity actually promotes workplace safety. This line of thinking has dangerous implications. It suggests that the State can proscribe any conduct it wishes, simply by stating it has a connection to drug use, no matter how tenuous. The statutes will not need to be otherwise related to a legitimate public purpose as long as they can be related to drug use or testing for drug use.

4. That this Court may have failed to consider that the activities of the Appellant encourage more secure testing methods by employers. They also serve the public interest by encouraging better methods of testing not subject to manipulation. Current urinalysis practices only serve the interests of private testers and not the interests of the public. Drug testing is a for-profit industry and its motivation is strictly profit.

5. That this Court may have misinterpreted the Appellant's website and his intention. The website discusses the use of the urine kits for urinalysis purposes but does not tout them as means to evade drug tests. No where in the sited material is there a reference to drug tests. The Court has misinterpreted the Appellant's public opposition to widespread urinalysis by employers as an intent to defraud drug screening tests. Drug screening tests are only one type of urinalysis.

6. That this court erred in determining that the state legislature correctly determined that the selling of urine to defraud drug tests is an unlawful occupation. The state legislature is not the final arbiter when determining legal principals, especially when they infringe upon a citizen's constitutional rights. Our Nation and state was created on a

system of checks and balances, therefore Appellant requests the Court to reconsider the weight and credence they previously gave to the Legislature while enacting such a frivolous statute.

7. That this Court may have failed to consider that the statute no longer fulfills its legislative intent once the presumptive intent clause is severed. This statute was enacted solely to shut down the Appellant's business. Severing the presumptive intent clause renders the statute ineffective for its purpose and therefore, the entire statute should be struck down.

8. That this Court may have failed to consider that there is no evidence that urinalysis or drug testing creates or encourages a drug-free workplace. Furthermore, the existence of drug metabolites is no indication of whether a person is impaired by those substances. The Legislature cannot enact any law it wishes under the guise that it deters drug use, if that act is not shown to serve a legitimate public purpose.

This Court erred in finding that the statute ensures drug screening is effective when there was no evidence presented to support that contention. Drug screening does not measure impairment in job performance. Tests of manual dexterity and cognitive sharpness would be more rationally related to a proposed public purpose of workplace safety than simply testing for the presence of metabolites.

This Court is correct in stating that drug screening has been held lawful in certain limited situations. The constitutionality of drug screening does not, however, extend to this statute which does not serve to protect the general safety and welfare of the public. No evidence has been presented that the Appellant's business actually serves to defraud drug tests or that the use of his product affects workplace safety. In fact, the drug screening tests do not indicate impairment at all and are therefore not useful for establishing problems with job performance or safety.

8. That this Court may have overlooked the plainly arbitrary classification in its discussion of the Equal Protection violation. As stated in the previous arguments, there is no indication that the Appellant's product has any

impact on the public interest or that it is rationally related to a legitimate public purpose.

/s Robert C. Childs, III
Robert C. Childs, III, S.C. Bar # 1218
Laura W. H. Teer, S.C. Bar # 16698
Beth M. Harbin, S.C. Bar # 69249
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rchilds@mbyclawfirm.com
Attorneys for Appellant

Date : October 24, 2000

## APPENDIX F

## S.C. CODE ANN. § 16-13-470

CODE OF LAWS OF SOUTH CAROLINA ANNOTATED
Copyright (c) 1999, The State of South Carolina

TITLE 16. CRIMES AND OFFENSES
CHAPTER 13. FORGERY, LARCENY, EMBEZZLEMENT, FALSE PRETENSES AND CHEATS

§ 16-13-470. Defrauding drug and alcohol screening tests; penalty.

(A) It is unlawful for a person to:

(1) sell, give away, distribute, or market urine in this State or transport urine into this State with the intent of using the urine to defraud a drug or alcohol screening test;

(2) attempt to foil or defeat a drug or alcohol screening test by the substitution or spiking of a sample or the advertisement of a sample substitution or other spiking device or measure;

(3) adulterate a urine or other bodily fluid sample with the intent to defraud a drug or alcohol screening test;

(4) possess adulterants which are intended to be used to adulterate a urine or other bodily fluid sample for the purpose of defrauding a drug or alcohol screening test; or

(5) sell adulterants which are intended to be used to adulterate a urine or other bodily fluid sample for the purpose of defrauding a drug or alcohol screening test.

Intent is presumed if a heating element or any other device used to thwart a drug-screening test accompanies the sale, giving, distribution, or marketing of urine or if instructions which provide a method for thwarting a drug-screening test

accompany the sale, giving, distribution, or marketing of urine.

(B) A person who violates a provision of subsection (A):

(1) for a first offense, is guilty of a misdemeanor and, upon conviction, must be fined not more than five thousand dollars or imprisoned not more than three years, or both; and

(2) for a second offense or subsequent offense, is guilty of a felony and, upon conviction, must be fined not more than ten thousand dollars or imprisoned not more than five years, or both.

History: Added by 1999 Act No. 65 § 1, eff June 11, 1999

Presumptive intent clause struck by South Carolina Supreme Court by Order dated July 17, 2001 filed in Curtis v. State, 345 S.C. 557, 549 S.E.2d 591 (2001).

# APPENDIX G

*S.C. Code Ann. § 41-1-15*
CODE OF LAWS OF SOUTH CAROLINA ANNOTATED
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TITLE 41. LABOR AND EMPLOYMENT
CHAPTER 1. GENERAL PROVISIONS

S.C. Code Ann. § **41-1-15** (1999)

**§ 41-1-15.** Establishment of drug prevention program in workplace; confidentiality of information concerning test results.

(A) Notwithstanding any other provision of the law, an employer may establish a drug prevention program in the workplace pursuant to Section 38-73-500(B) which shall include:

(1) a substance abuse policy statement that balances the employer's respect for individuals with the need to maintain a safe, productive, and drug-free environment. The intent of the policy shall be to help those who need it while sending a clear message that the illegal use of nonprescription controlled substances or the abuse of alcoholic beverages is incompatible with employment at the specified workplace; and

(2) notification to all employees of the drug prevention program and its policies at the time the program is established by the employer or at the time of hiring the employee, whichever is earlier.

(B) All information, interviews, reports, statements, memoranda, and test results, written or otherwise, received by the employer through a substance abuse testing program are confidential communications, but may be used or received in evidence, obtained in discovery, or disclosed in any civil or administrative proceeding.

(C) Employers, laboratories, medical review officers, insurers, drug or alcohol rehabilitation programs, and employer drug prevention programs, and their agents who receive or have access to information concerning test results shall keep all information confidential. Release of such information under any other circumstance shall be solely pursuant to a written consent form signed voluntarily by the employee tested or his designee unless the release is completed through disclosure by an agency of the State in a civil or administrative proceeding, order of a court of competent jurisdiction, or determination of a professional or occupational licensing board in a related disciplinary proceeding. The consent form must contain at a minimum:

(1) the name of the person who is authorized to obtain the information;

(2) the purpose of the disclosure;

(3) the precise information to be disclosed;

(4) the duration of the consent; and

(5) the signature of the person authorizing release of the information.

(D) Information on test results shall not be released for or used or admissible in any criminal proceeding against the employee.

**HISTORY:** Added by 1997 Act No. 92, § 2, eff June 10, 1997.

**NOTES:**

RESEARCH AND PRACTICE REFERENCES

62A Am Jur 2d, Privacy § 61.

28 Am Jur Proof of Facts 3d 185, Proof of Violation of Privacy Rights in Employment Drug Testing.

ANNOTATIONS

Liability for discharge of at-will employee for refusal to submit to drug testing. 79 ALR4th 105.

Employee's action in tort against party administering polygraph, drug, or similar test at request of actual or prospective employer. 89 ALR4th 527.

EDITOR'S NOTE--

The Preamble of 1997 Act No. 92 provides as follows:

"Whereas, the members of the General Assembly recognize the importance of all employers and employees in the State to maintain and operate in a drug-free workplace, and promote the participation of businesses in drug prevention programs. Through such participation, employers have the opportunity to maximize their levels of productivity, enhance their competitive positions in the marketplace, and reach their desired levels of success without experiencing the costs, delays, and tragedies associated with work related accidents resulting from substance abuse by employees; and

"Whereas, nationally, the cost of substance abuse in the workplace is estimated at a staggering one hundred billion annually, and this cost is paid by employers in many different ways; and

"Whereas, the intention of the act is to provide incentive for employers to prevent drug use and the tragedies associated with work related accidents and to deter the corresponding losses in the form of workers' compensation claims, personnel, and economic productivity; and

"Whereas, since workers' compensation insurers typically provide support services to employer-clients, the General Assembly believes that insurers will compete for the business of employers participating in drug prevention programs and will provide the appropriate premium credit for various classes of employment with a successful

program due to the administrative cost savings in many ways including those from a reduction in work related accidents by employees with substance abuse and litigation expenses;".

## APPENDIX H

| | | |
|---|---|---|
| IN THE STATE OF SOUTH CAROLINA | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF GREENVILLE | ) | |
| Kenneth E. Curtis, Individually, and d/b/a Privacy Protection Services, Plaintiff, | ) | C/A: 99-CP-23-2463 **COMPLAINT** |
| vs. The State of South Carolina Defendants. | ) | (Jury Trial Requested) |

Plaintiff hereby alleges:

### FOR A FIRST CAUSE OF ACTION
### (Constitutionality of Statute)

1. The Plaintiff Kenneth E. Curtis is a citizen and resident of the County of Greenville, State of South Carolina who owns and operates a business known as Privacy Protection Services whose principal place of business is the County of Greenville, State of South Carolina. Said business engages extensively in interstate commerce and does business with customers in most if not all States in the United States of America, including the State of South Carolina.

2. The Defendant State of South Carolina is one of the States in the United States of America and is the principal governing legislative authority in the geographical region of South Carolina.

3. The Plaintiff's business, known as Privacy Protection Services, has been in existence in the State of South Carolina for approximately three (3) years. The principal business of Privacy Protection Services, among other things, is

the sale of unadulterated and certified drug free human urine in interstate commerce. The Plaintiff has invested significant funds into said business and derives a substantial source of his income from said business.

4. At all times alleged herein the Plaintiff harbored a reasonable expectation of privacy and a protected property right in the use and conveyance of his own human urine. As such, the Plaintiff at all times alleged herein had and has the right to possess, use, sell or give away his urine if he wishes to do so. The Plaintiff furthermore uses the conveyance of his own urine as a manner of his expression and speech concerning the issue of urine testing in the United States of America.

5. The State of South Carolina, passed the attached and herein incorporated 1999 S. B. 277 (the "Act"), which was passed into law by signature of the Governor of the State of South Carolina on June 11, 1999. Said Act, among other things, prohibits the giving away, distribution or sale of human urine with the intent to defraud private drug testing procedures. The stated purpose of the Act was to "protect private businesses."

6. The Act fails to define essential terms such as "transport," "foil," "defeat," "spiking," "spiking device," "adulterate," "drug or alcohol screening," "heating element," and "thwart." The Act prohibits the "transport of urine with the intent of using the urine to defraud a drug or alcohol screening test." It is known to the Plaintiff that numerous herbs, health food products, concoctions, foods, vitamins, and over-the-counter substances are marketed and sold to the public, which may affect or that are advertised to affect human urine in a manner that may affect urine tests and that every living human being in South Carolina transports urine within their bodies. Furthermore, such products set forth above may be considered to adulterate urine or other bodily fluids.

7. The Act does not specifically limit its application to human urine or human bodily fluids and may be applied to urine tests that are unrelated to drug abuse or the unlawful consumption of controlled substances.

8. The Act presumes criminal intent and thusly impermissibly shifts the burden of proof from the State to a Defendant in violation of the requirements of Due Process.

9. Said Act is vague, overly broad, arbitrary and capricious, lending excessive discretion in enforcement officials and is without a legitimate and rational public purpose. The Act, furthermore, is inconsistent with the Constitution of the United States and contravenes a common right enjoyed by other providers of such similar type services and products. The Act fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the Statute and encourages arbitrary and erratic arrests and convictions. The Act assesses criminal liability without requiring criminal intent and makes criminal an innocent act.

10. The Act, furthermore, interferes with existing contracts established between the Plaintiff and private individuals and attempts to control the use of private property to the extent unnecessary for public welfare. The Act has also "chilled" the business of the Plaintiff and constitutes a wrongful and unconstitutional interference and deprivation of the Plaintiff's property rights to do business, his privacy rights, liberty to contract and freedom of speech in violation of the First, Fourth, Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States and Article I, Sections 2, 3 and 13 of the Constitution of the State of South Carolina and the statutory and decisional laws of the State of South Carolina.

11. The Act violates the United States Constitution's Fourth Amendment safeguards of privacy of individuals against arbitrary and unwarranted government intrusions and invades the privacy interests of the Plaintiff and others and the governmental interest in subject matter is insufficient to warrant the enactment of the same and diminishes personal privacy for a "symbol's sake." The Act does not regulate even-handedly to effectuate a legitimate local purpose and significantly effects and excessively burdens interstate commerce in violation of Article I, §8 of the United States Constitution.

12. The Act takes a portion of the Plaintiff's protected property rights in the business generated by sale of human urine without compensation. The Act has also created an arbitrary classification without a rational basis which amounts to invidious discrimination, in violation of the equal protection clause of the United States Constitution Amendment XIV, Section 1 and unreasonably interferes with the personal and privacy rights of the Plaintiff.

13. The Act bears no reasonable relation to a legitimate public purpose. The Act offends notions of liberty that are implicit in the concept of ordered liberty.

14. The Act provides a punishment so grossly disproportionate to the offense committed so as to be cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution and Article I, §15 of the South Carolina Constitution.

15. Wherefore, Plaintiff is informed and believes that he is entitled to an order of this Court voiding said Act for the above grounds and for attorney's fees and costs of this action.

## FOR A SECOND CAUSE OF ACTION
**(Ex parte, Temporary and Permanent Restraint From Enforcement)**

16. Each and every allegation of the preceding cause of action are incorporated herein by reference as fully as if repeated verbatim where not inconsistent herewith.

17. Said Act is causing immediate and irreparable injury, loss or damage, which are not easily ascertainable or calculable, and the Act furthermore subjects the Plaintiff to eminent threat of criminal arrest and prosecution.

18. Plaintiff is informed and believes that he is entitled to an ex parte temporary restraining order, temporary injunction, permanent injunction and writ of mandamus and staying the enforcement of this Act by the Defendants during the pendency of this action.

**FOR THIRD CAUSE OF ACTION**
**(Inverse Condemnation)**

19. Each and every allegation of the preceding causes of action are incorporated herein by reference as fully as if repeated verbatim where not inconsistent herewith.

20. The actions of the Defendant as set forth in the preceding causes of action are in violation of Article I, Section 3 and 13 of the Constitution of the State of South Carolina and the statutory and decisional laws of the State of South Carolina, along with the previously mentioned violations of the United States Constitutional, Statutory and Decisional laws.

21. The Plaintiff's property, liberty and privacy rights have been taken without compensation under the law by the enactment of the statute by the Defendant as set forth above.

22. As a direct and proximate result of the aforesaid, the Plaintiff has and will suffer substantial past, present, and future damage to the income of the business.

23. The Plaintiff is informed and believes that he is entitled to judgment against State for actual damages in an amount to be determined by a jury, plus attorney's fees and costs pursuant to South Carolina Code Annot. Section 15-77-300 (1976).

WHEREFORE, having fully plead, the Plaintiff prays:

1. that process issue;
2. for a jury trial on all issues so triable;
3. for judgment against the Defendant for actual damages in an amount to be determined by a jury;
4. for an ex parte temporary restraining order, temporary injunction, permanent injunction and writ of mandamus against the enforcement of the Act;
5. an invalidation of the Act in its entirety;
6. for attorney's fees and costs of this action; and
7. for such other and further relief as this Court deems just and proper.

**MITCHELL, BOUTON, YOKEL & CHILDS**

By: /s Robert C. Childs, III
Robert C. Childs, III #1218
P. O. Box 10285, F.S.
Greenville, SC 29673
(864) 232-9330
ATTORNEY FOR PLAINTIFF

Greenville, South Carolina
Dated: June 18, 1999

Introduced by Senators Thomas, Giese and Wilson

S. Printed 5/20/99-S

Read the first time January 12, 1999

---

A BILL

TO AMEND THE CODE OF LAWS OF SOUTH CAROLINA, 1976, BY ADDING SECTION 16-3-1080 SO AS TO PROVIDE THAT SELLING URINE WITH THE INTENT TO DEFRAUD A DRUG SCREENING TEST IS A FELONY, AND TO PROVIDE A PENALTY.

Amend Title To Conform

Be it enacted by the General Assembly of the State of South Carolina:

SECTION 1. The 1976 Code is amended by adding:

"Section 16-13-470. (A) It is unlawful for a person to:

(1) sell, give away, distribute, or market urine in this State or transport urine into this State with the intent of using urine to defraud a drug or alcohol screening test;

(2) attempt to foil or defeat a drug or alcohol screening test by the substitution or spiking of a sample or the advertisement of a sample substitution or other spiking device or measure;

(3) adulterate a urine or other bodily fluid sample with the intent to defraud a drug or alcohol screening test;

(4) possess adulterants which are intended to be used to adulterate a urine or other bodily fluid sample for the purpose of defrauding a drug or alcohol screening test; or

(5) sell adulterants which are intended to be used to adulterate a urine or other bodily fluid sample for the purpose of defrauding a drug or alcohol screening test.

Intent is presumed if a heating element or any other device used to thwart a drug-screening test accompanies the sale, giving distribution, or marketing of urine or if instructions which provide a method for thwarting a drug-screening test accompany the sale, giving, distribution, or marketing of urine.

(B) A person who violates a provision of subsection (A):

(1) for a first offense, is guilty of a misdemeanor and, upon conviction, must be fined not more than five thousand dollars or imprisonment not more than three years, or both; and

(2) for a second or subsequent offense, is guilty of a felony and, upon conviction, must be fined not more than ten thousand dollars or imprisoned not more than five years, or both."

SECTION 2. This act takes effect upon approval of the Governor

APPENDIX I

| | |
|---|---|
| IN THE STATE OF SOUTH CAROLINA | IN THE COURT OF COMMON PLEAS |
| COUNTY OF GREENVILLE | |
| Kenneth E. Curtis, Individually, and d/b/a Privacy Protection Services, Plaintiff, | C/A: 99-CP-23-2463 **AMENDED COMPLAINT** |
| vs. | (Jury Trial Requested) |
| The State of South Carolina Ex rel. Charles Molony Condon, as Attorney General for the State of South Carolina in re Act No.: 65, Defendants | |

Plaintiff, in conformity with the Order of the Honorable Henry F. Floyd, dated September 16, 1999, and without prejudice to the appeal presently pending and future appeals, if any, from the Order dated September 16, 1999 and without waiver of the allegations set forth in the Plaintiff's previous Complaint, hereby alleges:

**FOR A FIRST CAUSE OF ACTION**
**(Constitutionality of Statute)**

1. The Plaintiff Kenneth E. Curtis is a citizen and resident of the County of Greenville, State of South Carolina, who owns and operates a business known as Privacy Protection Services and whose principal place of business is the County of Greenville, State of South Carolina. Said business engages extensively in interstate commerce and does

business with customers in most, if not all, States in the United States of America, including the State of South Carolina.

2. The Defendant State of South Carolina is one of the States in the United States of America.

3. Hon. Charles Molony Condon, in his capacity as the Attorney General for the State of South Carolina, is the chief prosecuting officer of the State of South Carolina pursuant to S.C. Const. Art. V, §24 and supervises the prosecution of all criminal cases in courts of record including those brought in the County of Greenville in the State of South Carolina and supervises and is responsible for the activities of the South Carolina Attorney General's Office, one of which is to defend the validity of this Act. Hon. Charles Molony Condon is named for the purpose of staying the enforcement of the Act and defending the validity of this Act in conformity with the Court's Order.

5. The Plaintiff's business, known as Privacy Protection Services, has been in existence in the State of South Carolina for approximately three (3) years. The principal business of Privacy Protection Services, among other things, is the sale of human urine in interstate commerce. The Plaintiff, among other things, accompanies his sales with devices and instructions, which reflect the Plaintiff's beliefs concerning urine testing. The Plaintiff has invested significant funds into said business and derives a substantial source of his income from said business.

6. At all times alleged herein, the Plaintiff harbored a reasonable expectation of privacy and a mutually understood protected property right in the use and conveyance of his own human urine. As such, the Plaintiff at all times alleged herein had and has the right to possess, use, sell or give away his urine if he wishes to do so. The Plaintiff furthermore uses the conveyance of his own urine and accompanying devices and literature as a manner of his expression and speech concerning the issue of urine testing in the United States of America.

7. The Defendant, by and through the General Assembly, passed the attached and herein incorporated 1999 Act No. 65 (hereinafter referred to as the "Act"), which was passed into law by signature of the Governor of the State of South Carolina on June 11, 1999 and is a penal statute

subjecting the Plaintiff to arrest and prosecution at any time. Said Act, among other things, prohibits the giving away, distribution or sale of human urine with the intent to defraud private drug testing procedures. The stated purpose of the Act was to "protect private businesses."

8. The Act fails to define essential terms such as "transport," "foil," "defeat," "spiking," "spiking device," "adulterate," "drug or alcohol screening," "heating element," and "thwart." The Act prohibits the "transport of urine with the intent of using the urine to defraud a drug or alcohol screening test." It is known to the Plaintiff that numerous herbs, health food products, concoctions, foods, vitamins, over-the-counter substances and water are marketed and sold to the public, which may affect or that are advertised to affect human urine in a manner that may affect urine tests and that every living human being in South Carolina transports urine within their bodies. One of the primary adulterants of urine for testing purposes is common drinking water. Furthermore, such products set forth above may be considered to adulterate urine or other bodily fluids.

9. The Act does not specifically limit its application to human urine or human bodily fluids and may be applied to urine tests that are unrelated to drug abuse or the unlawful consumption of controlled substances. All drug tests are not intended to detect substances that might impair a human body.

10. The Act presumes criminal intent and thusly impermissibly shifts the burden of proof from the State to a Defendant in violation of the requirements of Due Process.

11. Said Act is vague, overly broad, arbitrary and capricious, lending excessive discretion in enforcement officials and is without a legitimate and rational public purpose. The Act, furthermore, is inconsistent with the Constitution of the United States and contravenes a common right enjoyed by other providers of such similar type services and products. The Act fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the Statute and encourages arbitrary and erratic arrests and convictions. The Act assesses criminal liability without requiring criminal intent and makes criminal an innocent act.

12. The Act, furthermore, interferes with existing contracts established between the Plaintiff and private individuals and attempts to control the use of private property to the extent unnecessary for public welfare. The Act has also "chilled" the business of the Plaintiff and constitutes a wrongful and unconstitutional interference and deprivation of the Plaintiff's property rights to do business, his privacy rights, liberty to contract and freedom of speech in violation of the First, Fourth, Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States and Article I, Sections 2, 3 and 13 of the Constitution of the State of South Carolina and the statutory and decisional laws of the State of South Carolina.

13. The Act violates the United States Constitution's Fourth Amendment safeguards of privacy of individuals against arbitrary and unwarranted government intrusions and invades the privacy interests of the Plaintiff and others and the governmental interest in subject matter is insufficient to warrant the enactment of the same and diminishes personal privacy for a "symbol's sake." The Act does not regulate even-handedly to effectuate a legitimate local purpose and significantly effects and excessively burdens interstate commerce in violation of Article I, §8 of the United States Constitution.

14. The Act takes a portion of the Plaintiff's protected property rights in the business generated by sale of human urine and deprives him of his own urine, both without compensation. The Act has also created an arbitrary classification without a rational basis which amounts to invidious discrimination, in violation of the equal protection clause of the United States Constitution Amendment XIV, Section 1 and unreasonably interferes with the personal and privacy rights of the Plaintiff.

15. The Act bears no reasonable relation to a legitimate public purpose. The Act offends notions of liberty that are implicit in the concept of ordered liberty.

16. The Act provides a punishment so grossly disproportionate to the offense committed so as to be cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution and Article I, §15 of the South Carolina Constitution.

17. Wherefore, a justiciable controversy exists between the parties and the Plaintiff is informed and believes that he is entitled to an order of this Court voiding said Act for the above grounds and for attorney's fees and costs of this action.

18. Alternatively, pursuant to the Uniform Declaratory Judgment Act, the Plaintiff is informed and believes that he is entitled to an interpretation of the Act by the Court to determine the relative rights, liabilities and responsibilities of the Plaintiff under the Act and in what manner he may, if any, legally comply with this Act, if said Act is valid and binding law.

**FOR A SECOND CAUSE OF ACTION**
**(Ex parte, Temporary and Permanent Restraint From Enforcement)**

19. Each and every allegation of the preceding cause of action are incorporated herein by reference as fully as if repeated verbatim where not inconsistent herewith.

20. Said Act is causing immediate and irreparable injury, loss or damage, which are not easily ascertainable or calculable, and the Act furthermore subjects the Plaintiff to eminent threat of criminal arrest and prosecution by the Enforcement Defendants.

21. Plaintiff is informed and believes that he is entitled to an ex parte temporary restraining order, temporary injunction, permanent injunction and writ of mandamus prohibiting the Enforcement Defendants from initiating the Plaintiff's arrest and prosecution and staying the enforcement of this Act by the Defendants during the pendency of this action.

**FOR THIRD CAUSE OF ACTION**
**(Inverse Condemnation)**

22. Each and every allegation of the preceding causes of action are incorporated herein by reference as fully as if repeated verbatim where not inconsistent herewith.

23. The actions of the Defendant as set forth in the preceding causes of action are in violation of Article I, Section 3 and 13 of the Constitution of the State of South Carolina and the statutory and decisional laws of the State of South Carolina, along with the previously mentioned violations of the United States Constitutional, Statutory and Decisional laws.

24. The Plaintiff's property, liberty and privacy rights have been taken without compensation under the law by the enactment of the statute by the Defendant as set forth above.

25. As a direct and proximate result of the aforesaid, the Plaintiff has and will suffer substantial past, present, and future damage to the income of the business of his rights.

26. The Plaintiff is informed and believes that he is entitled to judgment against the Defendant for actual damages in an amount to be determined by a jury, plus attorney's fees and costs pursuant to South Carolina Code Annot. Section 15-77-300 (1976).

WHEREFORE, having fully plead, the Plaintiff prays:

1. that process issue;
3. for a jury trial on all issues so triable;
3. for judgment against the Defendant for actual damages in an amount to be determined by a jury;
4. for an ex parte temporary restraining order, temporary injunction, temporary writ, permanent injunction and writ of mandamus against the enforcement of the Act against the Plaintiff;
5. an invalidation of the Act in its entirety;
6. for attorney's fees and costs of this action; and
7. for such other and further relief as this Court deems just and proper.

**MITCHELL, BOUTON, YOKEL & CHILDS**

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